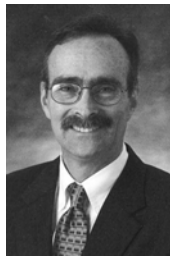


Workshop T3

Tuesday, October 30, 1:30–3:00 p.m. and 3:30–5:00 p.m.

THE LEAKY UMBRELLA—A CONTRACTOR'S PLIGHT

Presented by



Robert D. Heuer
Vice President
Guy Hurley Blaser & Heuer

The umbrella policy is meant to provide broad coverage over a contractor's underlying liability policies. In reality, for many contractors a growing number of limitations and exclusions has slowly chipped away at their upper layers of coverage. This workshop will help you avoid the nightmare of having to explain to a client (or to your boss!) why a multimillion-dollar claim is not covered by the umbrella policy you sold to (or bought for) the company.

- Identifies potential coverage gaps with respect to pollution, defective work, wrap-up projects, and various other claim situations.
- Compares key provisions of major umbrella policy forms.
- Provides strategies for filling coverage gaps in the excess layers.



5 reasons CNA is the right insurance solution for contractors.

- 1** We understand the construction business and insure a significant share of the industry.
- 2** We provide enhanced critical coverages for contractors that aren't readily offered by other carriers. These include enhancements like wrap around and excess limits coverages for work performed on Wrap-ups.
- 3** We provide Risk Control programs, information and education—via the Web, printed guides and classroom training—that can help identify and reduce your loss exposures.
- 4** Our experienced claim adjusters process claims quickly and fairly and help injured workers get healthy and return to work sooner. Your agent can access cases—day or night—through our Claim Web site. We make certain claim information available, as permitted by law.
- 5** We actively listen to the needs of contractors and constantly look to refine our products and services. One of the ways we accomplish this is through our association with risk management leaders, such as IRMI.

We're a great insurance **partner** when you need us most.

CNA helps manage the unique risks of construction professionals. Our partnerships with trade associations, industry experts and independent agents ensure that we stay ahead of industry trends and develop coverages based on your needs. And with more than 100 years of experience providing Claim and Risk Control services, we're there.

To find out more about CNA, call your local independent agent or visit www.cna.com.

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Robert D. Heuer
Vice President
Guy Hurley Blaser & Heuer

Mr. Heuer is presenting Workshop T3, "The Leaky Umbrella—A Contractor's Plight," on Tuesday afternoon. He is vice president and partner with Guy Hurley Blaser & Heuer, LLC, Insurance & Surety Services in Troy, MI. He brings to the agency 30 years of experience selling and servicing insurance and bonds for contractors of all types. Mr. Heuer spent time in the Michigan and California offices of a national insurance brokerage firm (Willis North America). He is member of the Associated General Contractors of America national risk management committee and has spoken and written extensively on various surety and insurance subjects for a wide range of industry groups, including AGC, CFMA, IRMI, the Stanford University School of Graduate Engineering, the Engineering Society of Detroit, and the Michigan Association of Certified Public Accountants. Mr. Heuer earned a degree in journalism from the University of Michigan in 1974.

His presentations include: "Construction Risk Management Defined for the CFO or Controller" seminar copresented with a contractor partner, on several occasions, to a national CFMA conference, various local CFMA chapters, and the joint AGC/CFMA National Conference; "Self-Insurance: What Every Contractor Should Know" article for the March-April 2003 issue of CFMA's *Building Profits* magazine; "The Leaky Umbrella—A Contractor's Plight," published in CFMA's *Building Profits* magazine, 2006; Surety Case Study, presented to MACPA Construction Conference, 1997 and 1998, to the IRMI Construction Risk Conference, 1998, and to the National CFMA Conference, 1999; "Professional Liability Coverage: It's Not Just for Design/Builders Anymore" article for CFMA *Building Profits*, May-June 1998 issue; and "Examining the 'What Ifs,' A Guide to Project Risk Assessment and Insurance Purchase," presented to the IRMI Construction Risk Conference, November 1999.

Notes

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THE LEAKY UMBRELLA—A CONTRACTOR’S PLIGHT

*Robert D. Heuer
Guy Hurley Blaser & Heuer*

I. The Major Culprits—Umbrella Exclusions over Underlying Coverage

- **“CCC”** (Care, custody, control)—vs. “Broad form PD” of underlying
- **Professional Liability**—Which exclusion endorsement? (Three different ISO exclusion forms, plus other manuscripted.) Umbrella frequently excludes more than primary.
- **“Cross-Liability”** (Insured vs. Insured)—If not changed to “Named vs. Named” owner who is also an additional insured could have no right to claim
- **Pollution**—Each of the following liable to be treated differently in primary and Umbrella:
 - “Total”
 - ISO wording
 - hostile fire
 - auto
 - limited worksite cover
- **Uninsured/Underinsured Motorists**—Primary now usually written at \$1,000,000 combined BI/PD limit. But coverage for legal action from uninsured driver accident ends there when umbrella excludes.
- **Wrap-Up Exclusion**—Wording varies by form; issues include exhaustion of wrap-up limits and expiration of completed operations coverage time extension before statute of repose runs. Either situation could mean no cover beyond \$1,000,000 on project that “is or was” covered by wrap-up
- **Additional Insured**—Most forms now have blanket additional insured wording, but it frequently does not mirror primary
- **Named Insured**—Most umbrella forms do not grant insured status to any party who is named insured in primary. Therefore, all N.I.s from primary must be named again in umbrella

- **Mold, Silica, Fungi, Microbial Matter**—Now usually excluded equally by both primary and umbrella, but “respirable dust” is a newer exclusion, could be on umbrella, not primary
- **Punitive Damages**
- **Known Injury or Damage**
- **Residential Construction**—Definition of “residential” varies, could well be broader on umbrella than primary
- **Subsidence**—Frequently excluded by wholesale umbrella market carriers with geographical concerns, e.g., California. Rarely excluded by primary CGL outside heavy exposure states.
- **Marine Liability**—Doesn’t appear in CGL. Umbrella exclusion intends to apply to hull/P&I exposures, but wording varies, damage to bridges included in some.
- **U/L Aggregate Depletion by Claims Not Covered by Umbrella**—Present in most forms, it means umbrella won’t include loss dollars from claims covered by broader underlying CGL (e.g., pollution) towards satisfaction of U/L aggregate limits. If this occurs, insured pays that amount before umbrella applies to claims once U/L aggregate limit is exceeded.

II. A Look at Specific Construction Industry Carrier Forms

- Travelers
 - Primary vs. Umbrella
- Zurich
 - Primary vs. Umbrella
- AIG
 - Primary vs. Umbrella
- CNA
 - Primary vs. Umbrella
- Scottsdale
- ACE/Westchester
- Lexington
- RSUI
- Chubb

III. Using Same Carrier, for Primary and Umbrella—Best Way To Go?

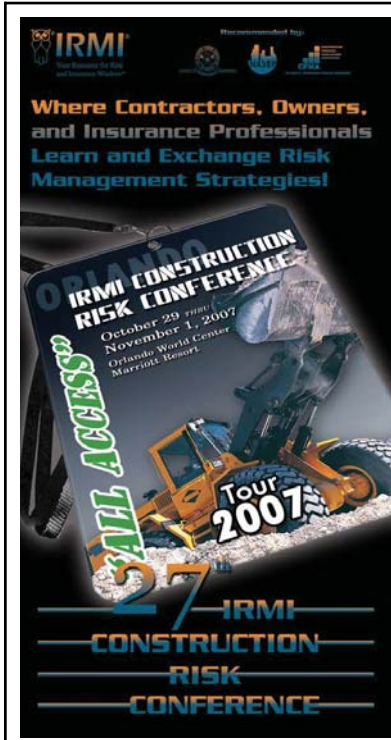
- Convenience factors
 - Placement
 - Claim reporting/handling
- Coverage factors
 - Avoid wholesale market “specials” e.g.
 - subsidence
 - cross-liability
 - care, custody, control
 - insured vs. insured

IV. Negotiating Following Form Umbrella Coverage—What Can You Get in Today’s Market?

- Cross-liability limited to “Named insured vs. Named Insured”
- CCC exclusion to follow form primary broad form PD or equivalent
- Blanket additional insured wording
- Pollution: exceptions for hostile fire and/or auto collision/upset
- Per project aggregate
- Subsidence removed in low exposure states

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The Leaky Umbrella— A Contractor’s Plight

Presented By:
Robert D. Heuer
Partner

GUY HURLEY BLASER & HEUER
Troy, MI

Nightmare Scenarios



- **Insured vs. Insured**
- **Pollution**
- **OCIP**

2

MAJOR CULPRITS



- **Care, Custody, Control**
- **Professional Liability**
- **Cross Liability**
- **Pollution**
- **Wrap-up**
- **Per Project Aggregate**
- **Who is Insured**
- **U/L Aggregate, Delayed Dropdown**

3

Care, Custody, Control



Primary CGL

- **Per ISO “ Damage to Property” exclusion j. (that particular part” etc.)**

Umbrella

- **“Property in your care, custody or control”**
- **“PD to property or equipment being installed, erected or worked upon by the insured or by any...subcontractors of the insured”**

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Professional Liability



Primary CGL

- **No exclusion, or per various ISO exclusions, e.g. “...Professional services do not include services within construction means, methods, sequences and procedures employed (in) your operations as a construction contractor”**

Umbrella

- **“BI/PD arising out of any professional services performed by or on behalf of the insured, including but not limited to...”**

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Cross Liability



Primary CGL

- **No specific exclusion**

Umbrella

- **“This insurance does not apply to BI, PD or personal injury arising out of any claim or suit brought by any insured against another insured”**

6

Pollution Liability



Primary CGL

- Per ISO CGL exclusion f. “Pollution” including exceptions for hostile fire, pollutants not brought to site and collision/upset
- Per various “Limited Worksites Pollution coverage” (with possible sub-limit)

Umbrella

- Total pollution exclusion
“...which would not have occurred but for actual, alleged or threatened discharge, dispersal, seepage, release... of pollutants”

7

Uninsured/Underinsured Motorists



Primary Auto

- Included, at purchased limit

Umbrella

- Excluded by endorsement

8

Wrap-ups



Primary CGL

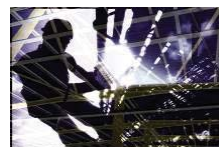
- **No exclusion, or per various carrier forms**
- **“BI/PD arising out of any project insured under a ‘wrap-up’ or any similar rating plan”**

Umbrella

- **Per ISO form CU 21 17 09 00: “... does not apply to ... ongoing ... or completed operations ... whether or not ... wrap-up”**
 - **Provides identical coverage**
 - **Has limits adequate to cover all claims**
 - **Remains in effect**

9

Per Project Aggregate



Primary CGL

- **Included automatically or by request, typically without charge**

Umbrella

- **Most forms: Aggregate applies separately to Products/Completed Ops and to all other, and not to Auto. No follow form per-project unless added by endorsement.**

10

Who is Insured



Primary CGL

- **Named Insured – as listed**
- **Blanket A.I. – per various endorsements**
- **Unnamed or terminated JVs – as covered by various extension endorsements**

Umbrella

- **Named Insured – as listed, not automatic if on primary (most forms)**
- **Forms contain “Insured” and “Named Insured” definitions**
- **“Depends on what the meaning of ‘You’ is”**
- **Blanket A.I. – most forms follow underlying blanket A.I. terms**
- **JV’s – “No person or organization is an insured with respect to the conduct of any current or past partnership or JV not listed in the Declarations”**

11

Delayed Dropdown



- **Excludes from U/L aggregate satisfaction, payments for underlying claims that would not have been covered by the Umbrella**
- **Where to find in forms**
 - **Limits of Liability or Insuring Agreement / Policy Definitions section**
 - **“...to which this insurance applies”**
 - **“...claims covered hereunder”**
 - **“...for which insurance is provided under this policy”**
 - **“...over the applicable underlying limit”**

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Carrier Forms Comparison



- **Travelers**
- **Zurich**
- **CNA**
- **AIG**
- **Others**

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What Can You Negotiate in Today's Hard Market?



14



**What Can You
Negotiate in Today's
Soft
~~Hard~~ Market?**

15



**What Can You
Negotiate in Today's
Fickle
~~Soft~~ Market?**

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